

# A Methodological Critique on Constitutional Amendment Theory

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## Abstract

This paper presents a methodological critique on constitutional amendment theory. It focuses on the limits of the current dependent variable of amendment rate, as well as the main independent variable of constitutional rigidity.

Going beyond the methodological critique of the current available models, this paper presents the first steps into creating a Theory of Constitutional Amendment that takes into account the demand for constitutional amendment problem. In order to do so, this paper poses a demand theory of constitutional amendment in three different dimensions: 1) how current majorities aim to control future majorities through the constitution; 2) how national majorities control local majorities through the constitution (and vice versa); 3) how current majorities amend the constitution to respond to judiciary decisions. The paper finishes with case studies where disputes between the judiciary and government triggered new amendments, and some research notes.

Keywords: constitutionalism and democracy; constitutional amendment; constitutional theory

## Introduction

The Political Science compared literature on constitutional amendment has been searching – for a while now - for a predictable model of these amendments. Early works focused on studying grand features of political systems usually did touch on the subject, such as in Lijphart's model of consensual versus majoritarian democracies (Lijphart, 2003). Constitutionalism, constitutional law, the subjects of constitution crafting and constitutional change themselves have been subject of intense debate and study since at least "The Federalist Papers". Lately, though, a more focused approach on the problem of constitutional amendment itself has come to the fore (Lutz, 2006; Lorenz, 2005; Elkins Ginsburg and Melton, 2009; Couto and Arantes, 2008).

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Even given all this focus, ongoing literature still suffers from stagnated concepts regarding constitutional amendment, as well as from a lack of a better understanding on how it relates to democratic political systems. The problem strains from the current understanding of the concept of *constitutional rigidity*, and its focus on the rule of amendment, as well as from how it gets confused with the constitutional amendments themselves.

Criteria to evaluate constitutional change is hardly a peaceful issue. Lutz's pioneering work used "rate of amendment" as a dependent variable, in order to explain constitutional change (Lutz, 1994). If we stick to Lutz's basic suppositions, the relationship between "constitutional rigidity" and "constitutional amendment rate" is pretty much a straight forward one: the more difficult is the rule that establishes the procedure to amend the current constitution, the less amendments we shall see over time. Given a competitive political regime, of course - a consideration which Lutz himself doesn't take into account.

Constitutional rigidity curbs constitutional amendment in two ways: both by a) making it harder for proposed amendments to clear voting in the amendment procedure; and b) in doing so it discourages that amendment proposals be made in the first place. Overall, rigidity works by either adding veto players to the amendment process (Tsebelis, 2009), or by increasing the number of votes required to achieve a supermajority within a single collective veto player level.

However, it is yet to be understood - or touched upon - by any theory how different kinds of veto players, or even how internal voting procedures and coalition management, interfere with the easiness of a specific rule of amendment. The Brazilian case of the 1988 Constitution has raised several red flags regarding this issue. Having been approved after a grueling two year constituent process, Brazil's current constitution has already received 90 amendments as of 2015's end, even though a 3/5 majority in both Senate and the Chamber of Deputies is required for an amendment to pass. It means that although demanding a larger than simple majority, the procedure itself is not such a hard one, if we compare it to other Constitutions around the world.

Even if we take into account - which current theories don't - the fact that the Brazilian presidential political system works through a complicate mishmash coalition of several political parties, it is still relatively easy to pass legislation through Congress, given the inner workings of Brazil's current coalition government style of presidentialism (Limongi, 1999).

My main objective here is to deliver a methodological and theoretical critic on the constitutional amendment theory. In a way that steers the current landscape away from strict considerations over constitutional rigidity, and towards a theory of constitutional amendment that asks **why are constitutions amended in the first place**.

Transitioning from the methodological critique, I explore three theoretical dimensions that determine constitutional amendment, going beyond the limited correlation between constitutional rigidity and constitutional amendment. But before that - on sections 2 and 3 -, I first identify the different concepts and variables through which the literature has framed the issue of constitutional change, as well as the strategies to measure it, with the objective of conceptual clarification. Afterwards, I turn to take a look at the three dimensions that drive constitutional amendment, which hopefully will serve as a guide for future research. These three dimensions are the following.

The first is **controlling the future**. This dimension is the next theoretical step up from the current theories that correlate constitutional amendment and constitutional rigidity. It pertains to how legislative majorities seek to entrench policy choices at the constitutional level, taking advantage of - and being restricted by - the amendment rules. By concentrating only on the effects of constitutional rigidity on constitutional amendment, current studies ironically are not theorizing about why constitutions get amended, but they are actually asking why constitutions *don't* get amended. A theory of constitutional amendment must seek what drives the amendments in the first place.

Other works on constitutionalization have asked precisely that question, although not necessarily connecting specifically to the amendment process. Exploring the paradox of the relation between constitutionalism and democracy, recent literature is focusing on the mechanisms that drive political majorities to "tie up" their own legislative hands, either by creating new constitutions, or amending existing ones.

The underlying theoretical question can be summed up in Holmes' work on the subject "Why a nation that rests legality on the consent of the governed would choose to constitute its political life in terms of commitments to an original agreement?" (Holmes, 1999, p.217).

An answer to this question can be found in recent insurance model works on constitutionalization. These works theorize that, given a context of either high political uncertainty, or the political certainty of losing political power, current majorities may seek to constitutionalize their current policy choice preferences (Hirschl, 2004; Knight, 2001). Also, retroactively, current majorities may have to deal with heavy constitutional legacies, in order to implement ordinary government policies (Couto and Arantes, 2008);

The second dimension is **the federative pact**: Constitutions are also an instrument to mediate, enforce and sustain federalism (Lijphart, 2003). In that sense, constitutional amendments may be put forward as a way for subnational governments to put restraints on their national government, taking away either budget resources or legislative authority. In the same vein, the opposite may also be true, and national governments may seek to curb sub-national sovereignty on specific legislative issues, in order to implement a national level policy. Arretche (2012) has explored this hypothesis by studying how Brazilian legislators in the Senate have voted in constitutional amendments that detracted power and resources from Brazilian States, in favor of the Union.

The third and last dimension is **fighting over constitutional interpretation**. Another frequently mentioned, but seldom studied dimension of constitution amendment, is how constitutional review may drive the amendment of constitutions. In current democratic regimes, constitutions often become repositories of fundamental rights, which protection is entrusted to State bureaucracies who have the last saying regarding the constitutionality of a law. Since these judges and magistrates are purposefully relatively insulated from the will of governments, their views on the constitutionality of laws may clash with a given government's. Once a given

constitutional interpretation is established through judicial review of a law, government majorities still have several weapons to try and reverse it, one of which is amending the constitutions itself. Afterward, in some cases, the amendment itself may also be subject to judicial review, which also may affect constitutional growth yet again.

### **1. The dependent variable: How to measure constitutional amendment and constitutional change?**

Before we get to the theories of constitutional amendment, we must first discuss how to measure constitutional texts and constitutional amendments. One of the biggest issues is conceptualizing constitutional change, and the problem ends up compromising more complex works that seek to correlate constitutional rigidity and constitutional amendment, because of lack of conceptual clarity. So, before we tackle the theories themselves, we must first properly define constitutional amendment, so we can properly identify and quantity the phenomenon.

Elkins, Ginsburg and Melton (2009) utilize the term *constitutional change* in their study about the endurance of national constitutions. Their focus is to explain why constitutions die. In this context, the term *constitutional change* is used to characterize processes of amendment of current constitutions, as well as constitutional death - which itself can mean both the enactment of a new constitution as well as simply the loss of effectiveness of the current one. To make that sort of distinction, the authors sometimes talk about "intra-constitutional" as opposed to "extra-constitutional" changes (p. 74-76), and also "constitutional amendment" as opposed to "constitutional substitution" (p.55-59). However, their focus is mainly on constitutional death and substitution, and here we are concerned with constitutional change through regular amendment.

Constitutional amendment, on the other hand, may also encapsulate two different processes: amendment done according to rules established in the constitution itself, which alter the constitutional text; and change made through judicial interpretation, which alter they meaning, scope and application. The first method is commonly used by parliaments and governments - sometimes recurring to

national referendums - and the second one relates to change through interpretation made by Constitutional Courts or Judiciaries. Elkins, et al. call the first “formal amendment”, and the second one “informal amendment” (p.74)<sup>1</sup>. Here, I restrict constitutional change made through interpretation to those done strictly by judicial bodies, because where there is judicial review one expects the Judiciary and Constitutional Courts to have the final word over the interpretation of a Constitution. However, our focus is not on change done via interpretation, but on the change of the constitutional text itself, made through regular amendment.

Here, I use *constitutional amendment* and *constitutional change through interpretation* in the sense conceptualized by Elkins et al as “formal amendment” and “informal amendment”. The differences are important, and they have to do with the decision processes, the different actors involved in both processes, as well as the asymmetrical way they relate to one another, regarding who has the last word over Constitutional meaning. The process of constitutional interpretation itself is axiological to what is previously established in the formal text, and here lies the rationale behind why a constitutional amendment may reverse a judicial decision on the constitutionality of a law. The exception is made in the judicial review regimes where either a Judiciary or a Constitutional Court may review the constitutionality of the amendments themselves, through the way it relates to the original text, and to what is sometimes referred to as constitutional “stone clauses”, or a “basic structure” inside a Constitution. Of course constitutional review is not limited by axiology, and there can always be innovation through interpretation. The creation of the institute of constitutional review itself was one such case, in 1803 in the US, since there was no Constitutional provision allowing for it<sup>2</sup>.

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<sup>1</sup> “Within the existing bargain, there are two primary mechanisms by which constitutional change occurs: formal amendments to the text, and informal amendments that result from interpretative changes (typically, but not exclusively, facilitated by courts)”.

<sup>2</sup> In the well know case *Marbury VS. Madison* (1803). In India, as well, the power to review the constitutionality of constitutional amendments was *invented* by the Supreme Court of India, regardless what was written in the Constitution itself, and the manifest will of the Constitutional Assembly and subsequent parliamentary constitutional majorities as well, who manifested expressively against this.

Last, there are the terms “constitutional reform” and “constitutional revision”, which are sometimes used interchangeably, and are a kind of middle ground between a simple constitutional amendment, and the complete substitution of a Constitution by a new one. Constitutional reform is generally used in situations where there is a formal constitutional amendment, but the result is so overarching that sometimes people say it is a case of a new constitution. Examples are the reform to Brazil’s 67 constitution, made in 69, and also several reforms to the 1853 Constitution of Argentina. Constitution revision is a term usually used when there is a temporal requirement to the formal constitutional amendment process itself. The Brazilian Constitution of 1988, for instance, had a scheduled one time revision in 1993, which could be made through simple majority, thus bypassing the usual amendment process. Also, the Portuguese Constitution has a scheduled revision window that happens every five years. The idea behind this goes back to Thomas Jefferson’s famous quote where he said "I hold it that a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical"<sup>3</sup>. It is a crude way to equate the dynamic principle of democratic government, with the static idea of a Constitution.

It is important to clarify these concepts, because the current literature uses them interchangeably and with some degree of confusion, but I will not focus on the concepts of constitutional reform or constitutional revision for three reasons. First, they are not precise ones: what constitutes a “big” constitutional amendment enough that we should call it a “constitutional reform”? Secondly: there is no empirical gain by differentiating “constitutional amendment” and “constitutional revision”. “Constitutional revision” merely expresses another rule of constitutional amendment - one that is timely limited. And just as any other constitutional amendment rule, we should check it for its effects on constitutional amendment<sup>4</sup>. Lastly, there are contexts where the term “constitutional reform” was used, but it refers to exceptional moments of political upheaval where the regular rules of amendment were not

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See *Minerva Mills Ltd. and Others Vs. Union of India and Others* (1980) 2 S.C.C. 591. Also, the Statement of Objects and Reasons of the forty second amendment to the Indian Constitution.

<sup>3</sup> PTJ 11:92-93. Letterpress copy at the Library of Congress. Ford transcription is available [online](#).

<sup>4</sup> Lutz (2006) also sets aside the term “constitutional revision” because he understands it to not be precise enough (p. 152).

followed, which make them unfit to hypotheses testing of the impact of the rules on the constitutional amendment.

These distinctions are important not only to clarify what we are talking about when we talk about constitutional amendment, but also because there is a lot of *ad hoc* theorization regarding these different phenomena, and how they relate to one another. To Lutz, for instance (1994, p.358), the longer a Constitution endures without any amendments, the more likely the amendment process is actually occurring through other means, presumably judicial interpretation, such as the US Constitution<sup>5</sup>. Elkins et al actually test this hypothesis, but do not find a correlation between the presence of Constitutional Courts and constitutional endurance. However, both studies establish that low rates of constitutional amendment are correlated to the death of constitutions. Behind this prediction is the idea that change is inevitable, either because one cannot predict how constitutional design will work when actually put to practice, or because new situations may arise which require review of the constitutional structure. The dynamic principle of democracy ultimately wins against the static principle of Constitutions.

Theorizing about how different constitutional arrangements deal with the inexorable change of time, Elkins et. al. (2009, p.100) finds correlations between the endurance of a constitution and its level of *inclusiveness*, *detail*, and *amendment ease*. To these authors, a Constitution that is more like a big ordinary governmental law has a bigger chance to endure through time, but the correlation starts to work against constitutional endurance after a certain threshold.

## 2. Measuring Constitutions

How can we measure the rate of formal amendment of a constitution? The key concept the literature has been working on is “rate of amendment”. Usually, by constitutional amendment we take into account the number of amendments approved

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<sup>5</sup> Lutz leans on this *ad hoc* explanation to explain the American case as an outlier.



in a time period (Lutz, 2006; Lorenz, 2005; Elkins et al., 2009; Melo, 2007). This way of measuring constitutional amendment underlines the fixed political costs involved in approving an amendment, and not exactly how much a constitutional text was altered over time. More precisely, amendment rate measures how many times a given constitutional amendment threshold was achieved by majorities, and not exactly how much has the constitutional text changed. To do that, one would need a way to quantify constitutional text itself, thus producing a *variable to measure Constitutions*.

Such variable has actually been produced in recent works, but it has never been correlated with the concept of constitutional rigidity.

Revising his original article, in his later published book (2006, p.156), Lutz points out that "The more governmental functions dealt with in a Constitution, the longer it will be and the higher its rate of amendment". So, in theory, it is possible to measure how many "government functions" a constitution either has or gained through time, thus determining its "rate of amendment" not as number of amendments approved, but as the number of "government functions" gained or lost. Nevertheless, Lutz himself does not propose a variable to measure this dimension, and encapsulates it in his other variable - which he states positively influences constitutional amendment -, which is "word count". Therefore, government functions and word count are both treated the same way in his model: they aggregate more elements to a Constitution, making it bigger.

In Lutz's model, his key dependent variable "rate of constitutional amendment" (number of amendments/year) is to be treated as a variable partially explained by the independent variable "word count" (which also incorporates the idea of number of government functions). However, it is theoretically possible to treat "word count" as a dependent variable in itself, capable of measuring the rate of constitutional change, or how much two constitutions differ between themselves through time<sup>6</sup>. "Word count" can thus become a way to measure constitutions.

Elkins et al. (2009) propose a different way to quantify that which Lutz denominates "government functions". Besides measuring "constitutional detail" also as the number of words in a given Constitution (following Lutz's idea), they have

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<sup>6</sup> Melo (2007), for instance, engages in this exercise when he applies Lutz's model to the Brazilian case.

elected a self-made list of 92 (p.104) topics that may or may not be found in any given Constitution over time. Therefore, they created a variable to measure constitutions and – as a result - constitutional amendment. However, by doing it through inductively created topics, they open themselves to criticism regarding what they should or shouldn't have included in their list. "In this regard, we are faced with the delicate task of selecting the attributes with which to construct the measure. A related choice involves how deep down the decision tree we go" (Elkins, Ginsburg and Melton, 2009, p.24). An example given by the authors may illustrate the problems with this classification: when considering the electoral system for the lower house of Congress as a topic to be counted (if pluralistic or proportional), they leave behind a series of specific electoral mechanisms that are highly important to determine the way the election rules may determine the party system, which vary a lot in different Constitutions, such as district size, the mathematical rule that converts votes in seats, requirements for parties offering candidacies, and other such rules that govern elections and political parties. All of which are arguably as constitutionally important as the mere choice between pluralistic or proportional representation. Another example are presidential veto powers. In Elkins et al's model, there is a binary variable classifying whether a particular Constitution establishes presidential veto powers of legislation, but it leaves out the nature of the veto power, which may include partial or total veto. The inductively selected topics classification, therefore, necessarily leaves out several other topics that should arguably be included. It is not that the topics chosen are theoretically indefensible - quite the contrary - it's just that the lack of theorization regarding what should and should not be in a Constitution make it impossible to actually settle on a set list of topics.

Lastly, Couto and Arantes (2008) have developed a model to quantify constitutional texts in what they call "provisions". Each provision roughly refers to a legal command, such as a specific paragraph or a phrase inside a constitutional article. Furthermore, the model incorporates a theoretical distinction between Constitutional provisions and ordinary law provisions which were put into constitutional texts. They

differentiate them between *polity* and *policy*. The underlining hypothesis to the model are that 1) a constitution with more dispositions in general tend to be more amended in the long run, but also that; 2) a Constitution with more *policy* dispositions has an additional short term amendment drive. Thus, detailed Constitutions, to Couto and Arantes, are not necessarily Constitutions with too many words or topics, but Constitutions with too many *policies* incorporated into them.

Although the underlying logic behind counting words, topics or dispositions is the same - bigger Constitutions incorporate more aspects of political life and also tend to be more amended over time -, the different variables used to measure this idea may result in very different analysis regarding constitutional framework and amendment. Melo (2007, p.240), for instance, proposes that a Constitutions with many words is necessarily a detailed Constitution, and ranks the Brazilian 1988 Constitution (32 thousand words) behind the Portuguese Constitution of 1976 (41 thousand words) and way behind the Indian Constitution (137 thousand words). However, if we utilize Couto and Arantes' Methodology of Constitutional Analysis (MAC), the original text of the Brazilian Constitution (1855 dispositions) is more detailed than the Portuguese one (943 dispositions) and it is way closer to the Indian one (1656 dispositions) - with the addition that the Brazilian Constitution has much more *policy* dispositions (496) than the Indian one (83) and the Portuguese (42)<sup>7</sup>.

The question "How do we measure Constitutions and constitutional growth?" therefore raises at least four different answers that affect the analysis: the first, most common, is to treat "amendment rate" as a dependent variable and report on how many amendments were approved over time; the second one means counting the number of words (or letters, or lines...) of a given Constitution, and is indicative of its size and/or level of detail; the third one is to elect potential constitutional topics, and than count them over constitutional texts; and the forth one proposes that we count "dispositions", measuring at the same time constitutional length and framework.

The first way to measure constitutional change is tied to the theories of constitutional rigidity. As we saw, it doesn't actually measure constitutional size or

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<sup>7</sup> Source: Arantes and Couto 2006 and 2010. For India, personal data base. Project Constitutionalism and Democracy in Comparative Perspective.

growth, but how many times the amendment procedure was successfully overcome. The second way to measure Constitutions - counting words - actually produces a comparative variable capable of capturing size and change. However, one must face methodological hurdles when doing so: language is a barrier because different languages and local legal traditions may have lengthier or shorter ways to describe a legal command<sup>8</sup>. Also, there is no theoretical orientation whatsoever in just counting words, which limit the possibilities for more ambitious analysis. The third way to measure Constitutions - following a predetermined topics list - has a more complex theoretical approach to it, by implicitly asking the question of "what should a typical constitutional text contain?". However, the methodology does not directly poses the question, and simply inductively produces an arbitrary check list of constitutional topics, rather than deductively theorizing about the matter. By coming up short with a theory, Elkins et al's way of measuring Constitutions produces a topics-list open to an endless debate about what should and should not be in it, and how far down a topic tree should one go to produce new binary topics. It has a lot of comparative reach, though, specially in describing great constitutional changes across several countries, through time.

Couto and Arantes's way of measuring constitutional texts is based on an explicit theory of what should a Constitution contain. The theory has a normative side that draws from the evolution of Constitutions and constitutional theory, producing four types of constitutional dispositions: the *definitions of State and nationality*; the *rules of the game*; *individual fundamental rights*; and *basic material distributive rights*. The theory is also built upon causal claims regarding competitive democratic regimes, based on a more Schumpeterian approach. By this view, it treats Constitutions as the embodiment of a contingent contract between social forces. It states that, in

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<sup>8</sup> The 1999 Venezuelan Constitution, for instance, has a lot of rhetorical speech packed into a given phrase or legal command. It also features things like gender inclusive language, such as referring to "El Presidente or la Presidenta...". Of course, one may argue that by being gender inclusive, the Venezuelans are also making a statement about the importance of women in politics, but one hardly would argue that the lack of gender inclusive language in the Constitution of a Country such as Argentina means that women are forbidden to become Presidents.

democratic regimes, certain basic rules of the game and certain highly controversial rights are constitutionalized as a way to "free up" regular democratic politics. Without a previous agreement over this basic set of rules that constitute a polity, political elites would be unwilling to play the democratic game. Constitutions would thus make democratic politics viable both by enshrining the rights and procedures necessary for democratic regimes to function, but also by taking out certain highly controversial topics from majoritarian decision making, thus avoiding something akin to civil war. Such controversial rights are very historically contingent, and so would vary from country to country and also through time, but they would entail things like the right to property, or the right to universal health care, or other basic distributive rights aimed at society's less well-off, or basic environmental rights, among other examples. Nevertheless, how these rights would be achieved and through what actual government policies must be left out of Constitutions. Any level of policymaking detail that ends up in Constitutions only serves to hamper democracy by subverting the rule of majority, and inviting constant constitutional change or - worse - constitutional death.

As a way to operationalize this theoretical framework, Couto and Arantes created the "dispositions" variable, and manage to identify - within the theory - actual constitutional dispositions from policies that ended up inside Constitutions, thus increasing constitutional instability and change. The methodology also ties up nicely with the theoretical problem of having current majorities controlling future majorities through the Constitution, which will be taken up in the next section.

### **3. Controlling the future**

Comparative literature on constitutional amendment has been searching for a way to explain it through the notion of constitutional rigidity. Constitutional rigidity is a variable that encapsulates the costs imposed by a given amendment rule. The basic assumption behind it is pretty straight forward: the higher the difficulty imposed by the amendment procedure, the lower the number of amendments actually approved. Constitutional rigidity curbs constitutional amendment by two connected - although

different - mechanisms: a higher amendment rule threshold makes it that much unlikely that an amendment proposal gets approved; but it also serves as a deterrent to any amendment proposal in the first place.

In his pioneer empirical research regarding constitutional amendment, Lutz (1994) elaborated a general theory that would explain constitutional amendment based on the size of the original constitution (measured in word count) as well as on the rigidity of the amendment rule. His most robust finding is that procedures which incorporate some sort of popular consultation in them - such as referendum or a call for elections to ratify an amendment - are the ones most likely to curb constitutional amendment (Lutz 1994, p.363).

Lutz's work became a reference among researchers because it was the first to really tackle the issue. In Brazil, for instance, his study is reference to Melo (2013) and Arretche (2013, p.123) when comparing the rigidity of the 1988 Brazilian Constitution against other Constitutions.

However, Lutz's research presents a series of methodological problems. Lorenz (2005, p.351), when checking Lutz's amendment rate data for the cases of Germany, France, Ireland and New Zealand, finds that they are inconsistent. I also checked Lutz's data for India, and found a high discrepancy. Lutz claims the Indian Constitution's amendment rate is 7,29 amendments per year, but it is actually 1,71<sup>9</sup>. Peterlevitz (2010) also finds a discrepancy to the Colombian case, for the same analyzed period. Elkins et al (2009) also points additional data problems in 9 of the 32 countries analyzed by Lutz.

Lutz's variable regarding constitutional size and constitutional rigidity also presents problems. Lorenz tried to reproduce Lutz's experiment, but does not find a satisfactory relation between these two variables and amendment rate. After several tests, Lorenz (2005, p.355) concludes that "A model of explanation proposed by Donald S. Lutz which relies on two independent variables, the rigidity and the length of

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<sup>9</sup> See Lutz p. 170. The Constitution of India was amended 74 times between 1949 and 1992, the period analyzed by the author. <http://indiacode.nic.in/coiweb/welcome.html>.

constitutions, could not be verified for a sample of fully established democracies in the period of 1993–2002".

All these problems end up compromising Lutz's original work, even though his main issue is a theoretical one, and has to do with how his own constitutional rigidity index was created in the first place. Lutz's index was produced by sampling the amendment procedures of Constitutions from the fifty North-American states, and regressing them on their respective amendment rates. Afterwards, the author inverted the relation, and used the index created to predict the amendment rates of the North-American states' Constitutions, as well as the Constitutions of 32 countries. That creates an endogeneity problem, since the index itself was created based on the amendment rate of the sampled cases. Because of this, the index cannot afterwards be used to tautologically explain the amendment rates themselves. A careful analysis of the note written on Lutz's table 5.5, where he creates his index, shows it (Lutz 2006, p.165).

Figure 1 - Lutz's (2006, p.165) table 5.5

TABLE 5.5. *Comparative Effect of Majority Size on Amendment Rate in American State Constitutions*

	Required Legislative Majority					
	50% + 1	50% + 1 twice	60%	67%	75%	67% twice
Ratio of difficulty to simple majority <sup>a</sup>	1.00 (11)	1.04 (6)	1.26 (9)	1.62 (19)	1.83 (1)	3.56 (4)

*Note:* In this table, the decline in the amendment rate produced by each type of legislative majority has been normed against that of the least difficult method. This norming is accomplished by taking the simple (bicameral) legislative majority and dividing it by the success rate of proposals initiated by a two-thirds legislative majority, a three-fourths majority, etc. – always keeping the other variables constant. For example, the data indicate that in the American states, when the method of initiation is stiffened to require approval by a simple (bicameral) legislative approval *twice*, the amendment rate is reduced from the baseline of 71% to a little over 68%. Dividing 71% by 68% results in an index score of 1.04. Likewise, a requirement for a three-fifths (bicameral) legislative majority results in a success rate of 56%. Dividing 71% by 56% produces an index score of 1.26. A score of 2.00 therefore indicates a method that is twice as difficult, a 3.00 indicates a method three times as difficult, and so on. Table 5.3 arrays the empirical results from lowest to highest level of difficulty rather than according to any theoretical prediction. The results are mostly in line with commonsense expectations (although why a second majority vote has so little effect while a second two-thirds vote has so much is not clear).

<sup>a</sup> The numbers in parentheses indicate the number of states using this required legislative majority.



I reproduced the table as is, in order to facilitate visualizing the issue. The title of the table is “Comparative Effect of Majority Size on Amendment Rate in American State Constitutions”. But is it what is being calculated here? A careful reading of the note shows otherwise. Any increase in the “ratio of difficulty to simple majority” was calculated by a comparative proportional increase on the amendment rate of the selected Constitutions themselves. Hence, the index cannot be used to explain amendment rates, since it was produced from it. An adequate procedure would be to construct a rigidity index independently from the amendment rate, and then run a model to predict it.

Finally, Lutz’s case selection is not justified. It combines Constitutions from countries suffering military dictatorships, such as the Brazilian Constitution from 1967, with other democratic Constitutions (Lutz 2006, p.170). That is actually symptomatic of an overall problem regarding simply trying to correlate amendment rate with the amendment procedure, completely ignoring how the amendment rule actually interacts with the formation of majorities. We will get back to this point later.

Finally, Elkins et al (2009) also utilizes a similar strategy in order to create an index to evaluate the rigidity of constitutional amendment procedures. However, contrary to Lutz, they do not attempt to explain constitutional amendment rates by correlating them with a rigidity index, but they are preoccupied with the death of constitutions. Therefore, the relation established is between two distinctly produced variables - constitutional rigidity and constitutional death -, allowing for comparisons.

Here is how the authors define their constitutional rigidity variable, or as they name it: their “ease of amendment” variable.

The strategy, therefore, is very similar to Lutz’s: producing a constitutional rigidity variable by checking the variation of the amendment rate throughout different constitutional amendment systems. There are some methodological differences between the models, mostly because Elkins et al’s has a lot more data and variables to



work with<sup>10</sup>, and also because they make a distinction between national and sub-national constitutions<sup>11</sup>.

But the main difference lies not on the variable itself, but in what they use it for and the analysis produced. Despite very similar inductive strategies, the conclusions and propositions made by the authors of *Endurance* do not mirror the problems brought about in Lutz's model. That's because Elkins et al' do not use their rigidity variable - *ease of amendment* - to predict amendment rate, as Lutz does. They use it to predict *constitutional death* which is another binary variable. The authors' conclusion on the matter is that a Constitution with a less rigid amendment rule tends to endure more overtime. However, there are exceptions to this correlation, as shown by the US Constitution.

Another possible test that could be done using the *Endurance* data is between *ease of amendment* and constitutional growth, measured in the number of constitutional topics. That would be possible because the variable used to measure constitutional *scope* and *detail* was produced independently from the rigidity variable. The authors themselves do not test this correlation, which presumably would be a way to evaluate the impact of constitutional amendment procedures onto constitutional growth and change. There is an interesting exercise on that direction when the authors relate the impact of the amendment rate itself onto constitutional growth, but without taking a step back and try to evaluate the impact of the constitutional rigidity on constitutional growth - again, measured in topics and not in the number of amendments, in order to avoid the endogeneity problem<sup>12</sup>.

However, all the models that have endeavored to try and associate constitutional amendment and constitutional rigidity suffer from the same incomplete assumption. That one can derive constitutional rigidity from the rule of amendment alone, without giving any consideration to the political system and majority formation, and how it relates to the amendment procedure. In a literature review, Lorenz (2005,

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<sup>10</sup> For further details, see p. 225 to 229 from Elkins, Ginsburg e Melton (2009). Also, the methodological appendix is available in their website <http://comparativeconstitutionsproject.org/> (18/08/2010).

<sup>11</sup> Elkins, Ginsburg and Melton (2009) see note 13, p.50.

<sup>12</sup> This exercise can be found between pages 55 and 59, and is entitled "The sometimes fuzzy line between amendment and replacement".

p.355) comes to the following conclusion: “Has the pro intuitive effect of institutional rigidity been overestimated? Or must we refer to the all too common wisdom that any such comparative analysis which necessarily must be based on only a few variables, surely falls short of explaining everything with perfection?”. Curiously, by focusing on the amendment rule only, authors are not asking “why Constitutions are amended”, but rather “why Constitutions are not amended”. The distinction may be subtle, but it is an important one, because it leads to treating a necessary cause of constitutional amendment - the amendment rule - as a sufficient cause of the phenomenon. **Thus, one creates a theory of constitutional stability, and not a theory of constitutional change<sup>13</sup>.**

The theories of constitutional rigidity are based on what can be found in a more synthetic manner in the work of Tsebelis about “Veto Players” (2009). If we look to constitutional rigidity formulations, they are basically a way to quantify the impact of veto players on constitutional amendment stability. This veto power comes from institutional design, but it also has to do with preferences distribution among the different potential veto players. That way, the addition of a second legislative chamber into the approval procedure enhances the rigidity of the amendment rule. The same would presumably occur by the requirement of Presidential approval, or referendum. The qualified majority requisite also would enhance rigidity by changing the nature of a particular collective veto player. Finally, each of these different types of strategies has different impacts on constitutional growth. Lutz’s most compelling evidence shows that strategies that require popular consultation - such as referendum and intervening elections - are the most effective in curbing amendment. Immergut also draws the same conclusion on her study about the impact of institutional design on European health reforms (1992).

Although not able to take into account the different impact that different veto players may have on constitutional growth, Lorenz’s study is the one that best

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<sup>13</sup> There is a stated relation between constitutional rigidity and constitutional change both in Lutz (2006) and in Elkins, Ginsburg and Melton (2009): the excess of rigidity may lead to constitutional death. However, this claims not about constitutional amendment.

incorporates veto players theory directly onto the studies about constitutional rigidity (2005). However, even her study leaves out a crucial aspect of veto player theory, which leads to treating the constitutional rigidity concept as a sufficient, rather than simply a necessary component. That has to do with what Tsebelis calls the "absorption rule".

For any given political arena to actually constitute a veto player, it is necessary not just that the decision rule stipulates it by enhancing acquiescence requirements, but also that the potential veto player actually has a different set of preferences from the previous ones. If this doesn't happen, then the new player simply becomes "absorbed" by the previous ones.

An example of how such a thing may completely throw off constitutional rigidity theory is the case of the Mexican Constitution from 1917. Mexico has the same Constitution since 1917, and its amendment rule (article 135) states that any amendment proposal must be approved by 2/3 of both federal legislative houses, and also by the majority of state legislatures. However, it is a relatively demanding rule. Up to mid 1990s, the Mexican political system fostered very little competition, and the *Partido Revolucionario Institucional* - PRI - actually enjoyed overwhelming majorities in all the branches of government and legislative houses in all levels of government, so it had no problems actually achieving supermajorities in order to approve constitutional amendments. After the mid-nineties, though, the political system opened up and Mexico actually became a competitive system, with government parties needing to negotiate coalitions in order to approve an amendment, thus enhancing the rigidity of the amendment procedure without actually changing the rule.

Tsebelis (2009) deals with the issue of ideological dispersion and heterogeneity of the veto players in a substantive manner by researching preferences of the actors involved in the approval process of laws that polarize right and left. Cox and McCubbins (1999) have a procedural way of qualifying and analyzing heterogeneity among the actors. They argue that one needs to take into account not only the decision arenas when considering potential veto players (the *separation of powers*, as they put it), but also whether these actors actually represent distinct interests (*separation of purposes*). For there to be an actual veto player in a given legislative

procedure, it is necessary a combination of both separation of powers and separation of purposes. This is actually the conclusion that Lorenz appears to arrive at, at the end of her lengthy review of the rigidity literature (2005, p. 353): "Perhaps the growing influence of other independent variables, e.g. of political constellations, undermines the universal validity of Lutz's model of explanation".

The problem is further complicated by the fact that it is not enough to simply know the number of parties or representatives in order to assess the actual rigidity of an amendment procedure, although that would be an important step in such direction. It is also necessary to better understand what are the actual costs involved in the decision process, and how hard it is to form majorities in any given political system. As the literature on coalition presidentialism shows, simply having a highly fragmented party system does not mean paralysis or even obstruction of the decision making process (Limongi, 1999; Neto, Cox and McCubins, 2003). Even when the issue is as divisive as a constitutional amendment (Arretche, 2012; Melo, 2013). Quite the contrary, there is new evidence pointing to the fact that heterogeneity may be one element that actually drives constitutional growth. At least in a context of a policy oriented Constitution (Couto and Arantes, 2008). However, further study of this phenomenon is still required to understand the institutional drives behind constitutional growth.

The phenomenon may actually be a complex one, with intersecting mechanisms in the causal chain that drives constitutional growth: 1) an originally policy oriented Constitution becomes a drive for a government to further alter it, so as to revert previously constitutionalized policy choices; 2) in order to amend the Constitution, a government needs to form supermajorities, bringing even more actors within the legislative cartel; 2.1) once the opportunity is created, the government itself may seek to further entrench new policy choices and policy details within the Constitution; 2.2) other interests within the heterogeneous legislative cartel may also take the opportunity opened up by the amendment window to include their own

policy choices, which the government needs to support in order to secure the necessary votes; 3) a new government is elected, and the process starts all over again.

So, even if an increase in constitutional rigidity may make it harder for amendments to be approved, the ones that actually get approved may become considerably bigger than they would otherwise be, if the amendment rule didn't require so many actors to be included in the amendment process. That would only happen, though, in a context where you have two things: 1) a fragmented majority and; 2) an institutional setting that fostered cooperation among the different actors, such as a coalitional presidentialism where the Executive has several agenda setting powers.

Finally, of course, it is also possible that the approved amendments are actually striking out constitutional text, thus making the Constitution smaller, and not increasing its size. That's why it is so important to utilize variables that actually capture constitutional growth - such as Elkins et al's topics or Couto and Arantes's dispositions -, and not just the number of amendments approved over time.

These kinds of considerations have actually been successfully applied to constituent assembly settings (Ginsburg, 2003; Knight, 2001; Praça and Noronha, 2012), and also in contexts where regular majorities tied up their own hands constitutionally (Hirschl, 2004). The basic question asked in these insurance models is: why would a political majority tie up its own hands by creating Constitutions - or constitutional type legal texts - and insulated judiciaries with the power of judicial review? Constitutions actually hamper a government's ability to deal with uncertainty that comes both from new political situations that may arise, as well as unforeseen results of previous policy choices. Thus, at first glance, it does not make much sense for current majorities to create new constitutional texts and insulated judiciaries with the power of judicial review. Insurance models answer this question by making assumptions about the current constitutional actors expectations for the future, and drawing propositions about their present behavior based on these expectations<sup>14</sup>.

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<sup>14</sup> There are, of course, other theoretical explanations for why a majority would choose to tie up its own hands. Most notably, Elster's rational choice theory. Elster himself has made significant changes to his work, though, to the point of almost abandoning his initial - ironically - functionalist supposition, in favor

There are basically three possible competing assumptions: "1) one's present preference will be the majority (or dominant) preference in the future; 2) one's present preference will be the minority (or dominated) preferences in the future or; 3) uncertainty about future preferences" (Knight, 2001, p.365). In the case of one, insurance theory proposes that there is no incentive to constitutionalize the world, so as to avoid creating hurdles when dealing with future uncertainty. In the case of two and three, though, the proposition is that there is an incentive to constitutionalize the world, in order to tie up future generations to the current's policy choices. This constitutionalization is achieved by amending the current Constitution; enacting a new Constitution or constitutional type texts; and/or creating judicial review.

Insurance model theory is still to be applied specifically to constitutional amendment, although Hirschl's (2004) model comes very close to it. In order to study the assumptions and suppositions of insurance theory, Hirschl's work has purposefully steered away from constituent assemblies, and chooses to analyze contexts where constitutionalization was done by regular political majorities. His four case studies (Canada, Israel, South Africa and New Zealand) offer compelling evidence.

#### **4. The Federative Pact**

Constitutions are not just a political artifact that can be wielded by current majorities against future ones. They can also be used by subnational majorities to restrict the national government, or the opposite - they can become a way through which the national government limits local self-rule. In fact, written Constitutions seem to be a prerequisite for functioning federations (Lijphart, 2003). They regulate interactions among different levels of government in policy issues, budget, and political dispute such as federal interventions. They also set a base line for adjudicating issues that may arise. It is possible to conceive constitutional amendments that restrict

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of an insurance theory (Elster, 2000). For a comprehensive account of different theories, see Hirschl (2004).

legislative jurisdiction of the federal government vis-a-vis local ones, or vice-versa. The same applies to budgetary distribution.

Although still very little theorized, there are two possible mechanisms through which subnational units may drive constitutional amendment. The first is by having access to the amendment procedure itself, if the Constitution gives power to subnational governments either to initiate or approve an amendment. The US Constitution, for instance, does both. Amendments to the US Constitution may be presented either by the existing State legislatures, or by special conventions convoked to that effect. Furthermore, any amendment presented and approved by the national legislature must also clear 3/4 of the State legislatures, or ratifying conventions in 3/4 of the States. The Mexican Constitution also requires state ratification, and so does the Indian Constitution for amendments that affect some parts of it. The Brazilian Constitution does not require State ratification, but the amendment rule gives proposal initiative for a collective subset of the Brazilian states (although this has never been used successfully).

The second manner through which subnational governments may drive Constitutional amendment is a more subtle one, and it is by influencing state caucuses inside the national legislature. That is particularly possible in contexts of parliamentary overrepresentation of less populated States. This can happen either by the addition of a Senate requirement in the amendment procedure, or by overrepresenting the less populated states in the lower house, such as the case in Brazil. This second mechanism is specifically tested by Arretche (2012), when she verifies Senate and Chamber of Deputies voting on constitutional amendments that took away budget resources from the States, and sees if legislators align themselves according to their States. She finds that is not the case: in Brazil, Senators and federal Deputies vote according to party lines, even when the issue is related to resource distribution between states and federal government.

In order to further describe the drives behind Constitutional amendment, one must look at the amendments themselves and check which dispositions change the balance of power between States and the federal government, or change budget distribution and allocation.

## 5. Fighting over the meaning of the Constitution

There is a vast literature on constitutional review and the power of Constitutional Courts and judiciaries to revert decisions taken by political majorities, but this literature has merely brushed at how much judicial interpretation may drive constitutional amendment. In countries where judicial review exists and it is independently exerted by either constitutional courts or judiciaries, it is possible and even relatively common that judicial decision alter or revert government policy. When that happens, majorities may simply comply with the ruling, or choose to counter it through several means, one of which is amending the Constitution. If an amendment aimed at reverting a judicial decision is approved, there can be another round when the judiciary again may judge the constitutionality of the amendment itself, but that can only happen in a polity where there is judicial review of constitutional amendments. That is not always the case, such as in the United States. But in other countries there are specific constitutional dispositions that create impediments to amending the Constitution, such as Germany and Brazil. In other places, there may be a consolidated jurisprudence that states such an impediment. That is the case of India, and the "basic structure of the Constitution" doctrine created by the Supreme Court of India<sup>15</sup>. But even where there are written impediments to amending the Constitution, ultimately who has the last word over the constitutionality of an amendment comes to a tug of war between majorities and the judiciary, and that drives constitutional amendment as well.

There can be two types of constitutional amendments done in response to political attrition between the judiciary and political majorities. There are amendments which affect the judiciary politically, such as amendments that alter the powers of judicial review, or the number of judges inside a Supreme Court, or alter the relational structure inside the judiciary itself, giving more political power to some judges and

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<sup>15</sup> Kesavananda Bharati vs. State of Kerala. India Supreme Court, 1973.



courts in detriment of others; and there are amendments aimed at reverting specific policy decisions, by entrenching such policies inside the Constitution itself. In order to illustrate this, next, we will look at Brazilian constitutional amendments which were done either to tweak judicial political power, or to revert courts' policy decision.

Two major examples of constitutional amendments done to change the political framework of the judiciary, directly in response to conflicts between the courts and political majorities are the constitutional amendments 3 and 45.

After the promulgation of Brazilian Constitution of 1988, the hybrid model of constitutional review adopted created the institutional framework through which several conflicts arose between courts and the political majorities, specially during the 1990's major economic reforms.

The reason was mainly that it created several veto points to governmental policy within the highly independent Brazilian judiciary. By hybrid model of constitutional review, the literature describes the rather open model of constitutional litigation created in Brazil, where it combines both the European style of abstract review, done by a Constitutional Court, and also the American style of diffuse system where any judge or court may also strike down or alter the interpretation of a law, when faced with a specific case. The abstract European style of review system is concentrated in the Brazilian Supreme Court, which may, when provoked by constitutionally specified actors, strike down a law in its entirety, or alter its application. There are several actors which can provoke the Supreme Court to manifest in such a manner, those being: the President; the boards of any of the two federal legislative houses; the Federal Prosecutor-General; the board of the legislative house of the Federal District; anyone of the 26 State Governors or the governor of the Federal District (against State laws only); the Brazilian BAR association; any political party represented inside the national congress (there are usually around 20 and 30 political parties inside the chamber of deputies, some with only one representative); any national syndicate (pertained to the subject related to the syndicate). The Supreme Court is also the last appeals court in any case involving constitutional matters, mirroring the North-American diffuse style system. It means that any judge and any court - state or federal - may exert constitutional jurisprudence, and the last

word on the matter is reserved to the Supreme Court through appeals. Furthermore, *staire decisis* is a concept almost foreign to the Brazilian judicial system. It means that even if there is a precedent established by higher courts or the Supreme Court, judges are not bound by it and may decide different if they choose to do so<sup>16</sup> (Arantes, 1994; Taylor, 2008).

According to Arantes (2001), the increase in litigation through the concentrated and the diffuse system against the political majorities were the main reasons behind the reform of 2003, which was slugging its way through Congress since 1992. The reform became possible when the Workers Party – which was up until then the major opposition party - was elected to the Presidency, and started to face the same kinds of problems when dealing with the courts, which plagued the previous administrations. The most evident problems were that the judiciary was slow to settle policy matters, and didn't seem to act in a cohesive manner, even after a Supreme Court ruling. Thus, essentially two objectives were sought by the government with the 45th amendment. The first was to concentrate more power inside the upper Courts - mainly the Supreme Court - enabling it to choose its own cases, set precedents, and enforce its rulings against other lower courts' and judges' own political preferences. The second objective was to enable a degree of external control over the judiciary. Mainly as a way to monitor corruption in lower courts, coordinate administrative matters, and foster adherence by the lower courts and judges to Supreme Court precedents. The first objective was addressed through the creation of the new procedural modality of abstract constitutional review - the ADECON, (Constitutional Direct Action) - when the 3rd constitutional amendment was approved. The amendment also dealt with a highly controversial new banking transaction tax that was being halted by the courts<sup>17</sup>. The ADECON enabled the government to bring any matter slugging its way through

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<sup>16</sup> Except in the case of a Supreme Court binding decision, which was a mechanism created in the reform brought about by the 45th constitutional amendment exactly to counteract the problem of lower Courts ignoring Supreme Court jurisprudence. Since its creation, the Supreme Court only enacted 32 binding decisions.

<sup>17</sup> This is another example of a constitutional amendment done in response to the Supreme Court ruling on a specific policy issue.

conflicting court decisions right up to the Supreme Court, so it could give a binding ruling and settle the matter regarding the constitutionality of a law. The rest of the reform, though, only came in the extensive 45th constitutional amendment which also addressed the first objective, by creating another binding mechanism - the Binding Decision - which could be applied to any ruling that arrived at the Supreme Court through appeals. The second objective was addressed also in the 45th constitutional amendment, with the creation of the National Council of Justice, composed mainly by members of the judiciary itself, and presided over by the President of the Supreme Court.

These amendments contained several dispositions brought about in direct response of several conflicts between the judiciary and the political majorities, and they changed the internal political structure of the judiciary, as well as the power of judicial review itself, but there are also examples of amendments which were made simply done to counteract courts' rulings on specific policy issues. The most notable examples of such a type of amendment are the ones that dealt with electoral rules (52nd constitutional amendment) and creation of new municipalities (57nd amendment).

The first case was brought about by a decision regarding pre-electoral coalitions. Brazil has proportional elections for the legislative houses. The electoral districts for state legislatures and federal house of representatives are the states themselves, spanning the districts' magnitudes from 8 to 63, semi-proportional to the states' electorate<sup>18</sup>. Since 1989, during elections, it is common for political parties to form pre-electoral coalitions. This tactic increased greatly when state and federal elections started to coincide, beginning in 1994. The strategy behind this has to do with the fact that federal and state elections for executive and legislative all coincide, and many voters tend to repeat their vote in the proportional legislative elections as the one that was given to the executive. For the purpose of assigning seats, all the votes cast to all the parties who entered into pre-election coalitions are summed up, effectively turning the coalition into a party for the purposes of seat assignment. Also

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<sup>18</sup> The Brazilian districts' magnitude are purposefully manipulated to over-represent the less populated states, and under-represent the most populated ones. For more information, see Nicolau (2006).

it is important to note that Brazil has open listed proportional representation for the legislatures in the three levels of government, so position in the lists are determined by which candidates got the most votes. And since the electoral district is the state, parties may enter into different coalitions in different states, and into the presidential election as well. The end result is that small parties benefit from votes given to bigger parties - who are also disputing elections for governor and president - and the bigger parties benefit from having smaller candidates with localized constituencies also attaching their names to the bigger parties' candidates for the majoritarian elections. Finally it is also worth mentioning that this arrangement contributes for the increased number of parties in the Brazilian party system, as well as the lack of a voter connection with most of the political parties.

In 2002, the Electoral Superior Court of Brazil (TSE) ruled that any party that entered into a pre-electoral coalition for the presidential election, must also do the same into all the states' elections. The Supreme Court of Brazil confirmed this ruling<sup>19</sup>. Also, parties who didn't get into a pre-electoral coalition in the presidential elections could only get into coalitions with other parties that had done the same in the state level. The case was well known as the "verticalization of pre-electoral coalitions" (*verticalização das coalizões*)<sup>20</sup>.

As one may guess, that decision did not seat well with the political parties. As a response to that, the Senate approved in the record time of three months the amendment proposal number 548/02, but since there wasn't time to approve the proposal in the chamber of deputies, the court's ruling was the one applied for the 2002 elections. In 2006, with new elections on the horizon, the chamber of deputies approved the proposal, giving birth to the 52nd amendment to the Brazilian constitution. The amendment basically states that parties may enter into whatever pre-electoral coalitions they want in any elections. But again, this amendment was not applied for the 2006 elections, because it was the Supreme Court's understanding that

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<sup>19</sup> Supreme Court of Brazil, ADINs Nº 2.626 and Nº 2.628.

<sup>20</sup> For more information regarding the role of the Brazilian judiciary in electoral governance, see Marchetti (2012).

you cannot change electoral rules under one year of the elections themselves, which is categorically stated in article 16 of the Brazilian Constitution<sup>21</sup>. Nevertheless, since the 2010 election the amendment is in force.

Another case of amendment enacted in response to the judiciary has to do with the creation of new municipalities. Up until 1996, the procedure to create, fuse, incorporate or separate municipalities was regulated by each state, through complimentary state law, requiring a specific law in every case of alteration of municipal limits (article 18 of the federal Constitution). From 1988 to 1996, hundreds of new municipalities were created, mostly driven to acquire a share of the resources from the direct transfers made from the federal government to municipalities. In 1996, to try and contain the creation of new municipalities, Congress approved constitutional amendment 15, altering from states to the Union the prerogative to enact the complimentary law that would regulate the creation of new municipalities. However, this federal regulatory law was never enacted and some states took advantage of the vacuum and continued to create new municipalities on their own.

In 2000, because of municipal elections, the Brazilian Supreme Court had to face the problem, and did so in two different instances. First, it issued writs prohibiting newly elected mayors and municipal legislators from taking office, and found all the state laws that created new municipalities after 1996 to be unconstitutional<sup>22</sup>. Afterwards, having to deal with consolidated situations, the Court started to lean to the position that they were irreversible<sup>23</sup>. However, after justice Gilmar Mendes asked for a delay to deliver his ruling, the court came up with an inventive solution. Continuing judging these cases in 2007, after justice Mendes delivered his position, the majority of the court continued to follow its previous jurisprudence and found the created municipalities to be unconstitutional. However, on this new sitting, justice Eros Grau changed its vote, following Mendes and all the previous voting justices, thus upholding the unconstitutionality, but suspending the effects of the decision for the period of 24 months, giving time for the states to deal with the situation before the

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<sup>21</sup> Supreme Court of Brazil ADIN 3685/06.

<sup>22</sup> ADI-mc nº1706/DF ADI-mc; ADI-MC nº 2381/RS; ADI 2632/BA. Supreme Court of Brazil.

<sup>23</sup> See justice Eros Grau's (the decision's rapporteur) vote on ADI 3316 e ADI 2240. Supreme Court of Brazil.

2008 elections (presumably “uncreating” the municipalities)<sup>24</sup>. That did not occur, though, and to avoid the fall of the Dâmocles sword, Congress approved, at the end of 2008, constitutional amendment number 57, which amnestied all the municipalities created between 1996 and 2006, provided that “the requirements established in the states’ constitution were, at the time, met”.

## Future Research Notes

Despite the fact that the studies that advanced the most regarding the subject of constitutional amendment are the ones focused on constitutional rigidity, it is not possible to utilize the existing indexes of constitutional rigidity to explain constitutional amendment. This is due not only to the fact that there are several methodological problems with the indexes themselves, but also to the fact that they completely eschew how the rules for constitutional amendment actually interact with the larger political system, the process of majority formation, and the preference landscape of the political actors involved.

Whichever the theoretical dimension one decides to explore in order to explain constitutional amendment, it is necessary first to decide on an objective way to measure and quantify constitutional texts. So far the literature has come up with three different strategies: word count; constitutional topics; and dispositions.

Incorporating the decision making process into the study of constitutional amendment immediately raises interesting – and so far unanswered – questions regarding the impact of different majorities on constitutional amendment and growth. In order to advance on this topic, it is necessary to elaborate data sets that explore how the variation of coalition size and variation of preferences (number of parties that compose majorities, for instance) affect constitutional growth in a given country; as well as explore comparatively this same effect across different countries which have different coalition management regimes.

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<sup>24</sup> ADI 2240 and ADI 3316. Supreme Court of Brazil.

Two other dimensions are still completely unexplored: how the federative pact, and the interactions with constitutional review both affect constitutional growth.

Related to the federative pact, there are two types of theoretically possible amendments: there can be amendments that strengthen sub-national governments' independence in relation to their central government; or there can be amendments that reinforce central government's authority over sub-national ones. These changes may switch legislative authority among levels of government, or redistribute and re-allocate budgets and fiscal income prerogatives.

As for amendments traced back to judicial conflict with governments, there can be two different types as well. The first type of amendment changes judicial power and level of independence – either to reinforce it or to hamper it – in response to diffuse conflicts with governments. These are amendments that change the judicial allocation of political power in different levels of the judiciary structure; or amendments that seek to “pack the courts”, changing the number of justices in order to switch the balance of preferences in favor of governments; or finally amendments that change the power of judicial review itself. The second type of amendment that is done in response to judiciary/government attrition seek to constitutionalize a certain specific policy issue, in order to revert previous jurisprudence.

Finally, amendments may be credited to one, two or three different dimensions. It is theoretically possible to trace back a policy issue which was constitutionalized through a disposition introduced during the amendment process by a specific fringe coalition partner; which also changes budget distribution among different levels of government; and which also was the subject of attrition between sub-level governments and the judiciary. Mapping those out and creating a descriptive data set of constitutional texts, amendments and amendment propositions are the first step to explain constitutional change through amendments.

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